(2)

No. 00-651

FILED

NOV 20 2000

CLERK

IN THE

Supreme Court of the United States

NOVA H. ROBBINS, on her own behalf and as Attorney-in-Fact for ROBERT H. ROBBINS,

Cross-Petitioners,

v.

ANTONIA C. NOVELLO, as Commissioner of the New York State Department of Health, and RICHARD F. SCHAUSEIL, as Director of the Monroe County Department of Social Services,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

CHARLES S. TURNER
Monroe County Attorney
RICHARD A. MARCHESE, JR.
Deputy County Attorney
39 West Main Street
Rochester, New York 14614
(716) 428-2997

Attorneys for Cross-Respondent Richard F. Schauseil

ELIOT SPITZER
Attorney General of the State of New York
PREETA D. BANSAL*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
VICTOR PALADINO
Assistant Solicitor General
The Capitol
Albany, New York 12224
(518) 473-4321

Attorneys for Cross-Respondent Antonia C. Novello

* *Counsel of Record*

163603

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

11/80

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Reasons for Denying the Writ 1

I. The Decision Below Is Consistent With Decisions Of This Court. 1

II. The Decision Below Does Not Conflict With Decisions Of Any Other Circuit Court Of Appeals. 4

Conclusion 7

TABLE OF CITED AUTHORITIES

Page

Cases:

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 2

Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990) 1, 3

Guidry v. Sheet Metal Workers National Pension Fund, 10 F.3d 700 (10th Cir. 1993), *aff'd in pertinent part on rehearing en banc*, 39 F.3d 1078, 1083 (10th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995) 5

Ridgway v. Ridgway, 454 U.S. 46 (1981) 3

Shinehouse v. Guerin, 1996 U.S. Dist. Lexis 6680 (E.D. Pa. 1996), *aff'd*, 107 F.3d 8 (3d Cir. 1997) 5

Singleton v. Wulff, 428 U.S. 106 (1976) 3

Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville, 16 F.3d 52 (3d Cir. 1994) 4

United States v. Jackson, __ F.3d __, 2000 U.S. App. LEXIS 25353 (9th Cir. Oct. 12, 2000) 4

United States v. Smith, 47 F.3d 681 (4th Cir. 1995) 5, 6

Cited Authorities

	Page
Wissner v. Wissner, 338 U.S. 655 (1950)	3
Wright v. Riveland, 219 F.3d 905 (9th Cir. 2000) ..	4
Federal Statutes:	
29 U.S.C. § 1056(d)	2
29 U.S.C. § 1056(d)(1)	1, 2, 3, 6
38 U.S.C. § 454a	3
38 U.S.C. § 770(g)	3
38 U.S.C. § 1970(g)	3
Federal Rule:	
26 C.F.R. § 1.401(a)-13(c)(1)(ii) (1992)	2, 6

REASONS FOR DENYING THE WRIT

I. The Decision Below Is Consistent With Decisions Of This Court.

While the question presented in the conditional cross-petition, like the question presented in the petition, is one of public importance, the cross-petitioners are wrong in their assertion that the Second Circuit's decision on their claim under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1056(d)(1) (1999), is contrary to decisions of this Court (Cross Pet., pp. 6-7). The conditional cross-petition should therefore be denied.

In *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990), upon which cross-petitioners rely, this Court held that ERISA's anti-alienation provision prohibited a union from imposing a constructive trust on the pension benefits of a former union pension fund trustee in order to satisfying a judgment against the trustee, who had pleaded guilty to embezzling funds from the union. *See Guidry*, 493 U.S. at 375-376. The constructive trust, which this Court viewed as indistinguishable from a writ of garnishment, was imposed directly on the pension benefits in the hands of the pension fund, and thus violated the plain language of the statute. *Id.* This Court was not presented with the question, posed here, of whether ERISA's anti-alienation protections extend to funds paid out of the pension fund and *received* by the pensioner.

Cross-petitioners rely on this Court's statement in *Guidry* that ERISA safeguards "a stream of income" for pensioners and their dependents (Cross Pet., p. 6, quoting *Guidry*, 493 U.S. at 376). That statement, however, must be

read in context. In rejecting the union's argument that the Court should find an "equitable exception " to the statutory bar on seizure of pension funds where the pensioner engages in malfeasance or criminal misconduct, this Court stated that ERISA's anti-alienation provision reflects a congressional decision "to safeguard a stream of income for pensioners" and their dependents, "even if that decision prevents others from securing relief for the wrongs done them." *Id.* Exceptions to this policy, this Court stated, should be made by Congress. *Id.* In other words, the policy choice reflected in the statutory language is that pension funds should be distributed to and received by the pensioner and his dependents, even if such distribution thwarts the claims of creditors. It does not follow that the pension benefits must or should be protected even after receipt by the beneficiary.

As the Second Circuit correctly observed (App. A, 14a-15a), ERISA is ambiguous as to whether "benefits provided under the plan" refers only to pension benefits in the hands of the plan or also to benefits paid out of the plan and received by the pensioner. Thus, the court below properly deferred to the Treasury Department's interpretive regulation, which defines "assignment" and "alienation" under 29 U.S.C. § 1056(d)(1) to mean an arrangement "whereby a party acquires from a participant or beneficiary a right or interest *enforceable against the plan*." 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (1992) (emphasis added); *see generally Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (court should defer to agency interpretation of statute when the statute is ambiguous).[1]

1. Cross-petitioners' argument that the Treasury Secretary lacks the authority to issue regulations implementing Section 1056(d) is (Cont'd)

The wording of ERISA's anti-alienation provision stands in contrast to the wording of the anti-alienation provisions at issue in *Ridgway v. Ridgway*, 454 U.S. 46 (1981), and *Wissner v. Wissner*, 338 U.S. 655 (1950), the other decisions of this Court upon which cross-petitioners rely (Cross Pet., p. 7). In both *Ridgway* and *Wissner*, the statutes protected the benefits from attachment, levy, seizure or any legal or equitable process "either before or after receipt by the beneficiary." *See Ridgway*, 454 U.S. at 61 (quoting 38 U.S.C. § 770(g)); *Wissner*, 338 U.S. at 659 (quoting 38 U.S.C. § 454a). Indeed, this Court in *Ridgway* emphasized the "unqualified sweep" of section 770(g) (now 38 U.S.C. § 1970(g) (1991 & Supp. 2000)), stating that its prohibition was phrased "in the broadest of terms." *See Ridgway*, 454 U.S. at 61. No such language is found in 29 U.S.C. § 1056(d)(1), evidencing that the protections of ERISA's anti-alienation provision do not sweep as broadly as these other statutes.

(Cont'd)

not preserved for this Court's review because it was raised for the first time in the Second Circuit in a post-argument submission to that court. *See Singleton v. Wulff*, 428 U.S. 106, 120-121 (1976) (as a general rule, "a federal appellate court does not consider an issue not passed upon below"). In any event, as noted by the Second Circuit (App. A, 15a n.3), this Court in *Guidry*, 493 U.S. at 371-372 and n.10, characterized section 1.401(a)-13 as the "applicable administrative regulation[]" with respect to 29 U.S.C. § 1056(d)(1).

II. The Decision Below Does Not Conflict With Decisions Of Any Other Circuit Court Of Appeals.

Likewise erroneous is cross-petitioners' assertion that the Second Circuit's decision on their ERISA claim conflicts with the decisions "of two other circuit courts of appeals, and possibly three" (Cross Pet., p. 9). Thus, the Robbinses' alternative ground for the grant of the conditional cross-petition should be rejected.

The Ninth Circuit's recent decision in *United States v. Jackson*, __ F.3d __, 2000 U.S. App. LEXIS 25353 (9th Cir. Oct. 12, 2000), upon which cross-petitioners rely, is actually in accord with the Second Circuit's decision here. The Second Circuit held that the attribution of Robert Robbins' pension income to Nova Robbins did not violate ERISA because ERISA's anti-alienation provision does not protect funds after they have been paid to the pensioner (App. A, 13a-15a). In *Jackson*, the Ninth Circuit held that ERISA's anti-alienation provision prohibits a district court from directing that *undistributed* funds from an ERISA covered pension plan be used to make restitution. *See* 2000 U.S. App. LEXIS 25353 at *5-6. Critically, the court in *Jackson* noted that "ERISA's anti-alienation clause does not apply to pension funds that have already been distributed to the beneficiary." *Id.* (citing *Wright v. Riveland*, 219 F.3d 905, 919-921 (9th Cir. 2000)). In *Wright* — a case cross-petitioners fail to cite or discuss — the Ninth Circuit squarely held that ERISA's anti-alienation provision does not protect pension benefits once they are paid out of the plan and received by the pensioner. The Ninth Circuit in *Wright* stated that it was "follow[ing] the lead of the Third and Tenth Circuits" in *Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52 (3d Cir. 1994),

and *Guidry v. Sheet Metal Workers National Pension Fund*, 10 F.3d 700 (10th Cir. 1993), *aff'd in pertinent part on rehearing en banc*, 39 F.3d 1078, 1083 (10th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995) — the very cases relied upon here by the Second Circuit.

Contrary to cross-petitioners' assertions (Cross Pet, p. 8), there is also no conflict between the decision here and the unreported decision in *Shinehouse v. Guerin*, 1996 U.S. Dist. Lexis 6680 (E.D. Pa. 1996), *aff'd*, 107 F.3d 8 (3d Cir. 1997). In *Shinehouse*, the pensioner had not received the pension benefits prior to their attempted attachment by the pensioner's judgment creditors. *See Shinehouse*, 1996 U.S. Dist. Lexis 6680 at *2-4. Under those circumstances, the court concluded that "the funds in dispute were not received by the [pensioner] and thus remain protected by ERISA's anti-alienation provision." *Id.* at *12. Thus, *Shinehouse* relies on the same distinction drawn by the Second, Third, Ninth and Tenth Circuits, that pension funds are protected while in the fund but are not protected once they are distributed and received by the pensioner.

The only case that even comes close to presenting a conflict is *United States v. Smith*, 47 F.3d 681 (4th Cir. 1995), in which the Fourth Circuit held that a restitution order requiring a criminal defendant to turn over his monthly pension payments as he received them violated ERISA's anti-alienation provision. Insofar as the result in *Smith* is at odds with the results reached by the other circuits that have construed ERISA's anti-alienation provision, it is erroneous. Moreover, the decision below and the decisions of the Third, Ninth and Tenth Circuits relied upon and gave deference to the Treasury Department's interpretive regulation, which defines "assignment" and "alienation"

under 29 U.S.C. § 1056(d)(1) to mean an arrangement "whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan." 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (1992). In contrast, the majority in *Smith* failed to cite or discuss the Treasury Department's interpretive regulation.

Regardless of whether ERISA protects pension funds distributed to the pensioner, no alienation occurs here. For the reasons discussed in New York's petition concerning Robert's Social Security benefits, the attribution of Robert's pension benefits to Nova does not alienate those benefits. Despite the attribution, Robert continues to receive his pension benefits and is free to dispose of them as he sees fit. They are not seized by the State, and Robert is not coerced to use them to pay a debt. Indeed, the attribution of those benefits to Nova means that they are not counted in determining Robert's Medicaid eligibility. If this Court agreed with New York that the attribution of Robert's pension income to Nova does not alienate his pension benefits, it would never reach the alleged conflict cited by cross-petitioners.

CONCLUSION

For the foregoing reasons, this Court should deny the conditional cross-petition for a writ of certiorari.

Respectfully submitted,

CHARLES S. TURNER
Monroe County Attorney
RICHARD A. MARCHESE, JR.
Deputy County Attorney
39 West Main Street
Rochester, New York 14614
(716) 428-2997

Attorneys for Cross-Respondent
Richard F. Schauseil

ELIOT SPITZER
Attorney General of the State of New York
PREETA D. BANSAL*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
VICTOR PALADINO
Assistant Solicitor General
The Capitol
Albany, New York 12224
(518) 473-4321

Attorneys for Cross-Respondent
Antonia C. Novello

* *Counsel of Record*